

MCLS26 CONCLUSIONS

The growth of private enforcement

Private enforcement has begun to overtake the public enforcement of EU competition law in some European jurisdictions, notably in the digital space and in those markets with an effective collective redress system. In the UK, the number of damages actions (largely stand-alone) before the CAT (in excess of 20) now vastly outstrips the number of equivalent public enforcement proceedings commenced by the CMA, whether under the competition rules or *ex ante* digital market rules. Equally, the amounts of compensation can at times materially exceed the size of fines, as has notably been the case in the CNAM Plavix pharmaceutical litigation in France where damages have been awarded to the public health authority quadrupling the levels of fines.

In this brave new world of private-led competition law enforcement, third party funders take on an important role of case selection, according not to public policy criteria, but to criteria such as the probabilities of success, claim value, costs and recoverability. At the same time, this should allow public enforcers to further focus their attention on key cases from a public policy perspective. It also raises a greater need for consideration of intervention and coordination between national courts and competition authorities under existing rules (e.g. Article 15 Regulation 1/2003 or Article 37 DMA) in order to ensure the coherent application of competition rules.

The need for effective collective redress

The effective compensation of damage in a mass antitrust tort situation requires effective mechanisms for claiming and recovering that harm. This can currently be achieved through various bundling mechanisms; e.g. opt-in collective actions or assignment models. Jurisdiction rules also increasingly offer a tool for assisting in centralizing such claims.

However, this does not resolve the difficulties in bringing such claims where the number of affected parties is very high and/or the individual claim value relatively low. In such scenarios, the effective judicial protection of the EU right to compensation may require national procedural systems to adapt; e.g. by permitting claims for collective harm and the adequate distribution of compensation.

The availability of collective proceedings is, in practice, an implicit requisite of the decision of the EU legislator in the Damages Directive to establish the compensatory principle at the heart of the EU regime and to include pass-on as a defence. Without the availability of effective consumer collective redress, courts can, in practice, be reluctant to uphold the pass-on defence without tangible documentary evidence.

The uncertain world of hypotheticals: accepting “uncertainty”

The quantification of harm involves determining what would have happened in the absence of the infringement (the counterfactual). This is a key challenge which is characteristic of any competition damages litigation. Particular challenges are posed by

new markets where what would have happened in the counterfactual is difficult to predict. Such are the cases of new, fast-moving digital markets (how would a new competitive service have evolved if there had not been exclusionary behaviour by a dominant platform operator?) or the opening of pharmaceutical markets to generic competition (how would the market share of generic drugs have evolved if it hadn't been for the exclusionary behaviour of, or pay-for-delay agreements with, the originator). Decisions as to what is the relevant market and which are the comparator products are complex and key to this.

At the same time, the determination that harm has occurred requires courts to accept a degree of uncertainty as to these counterfactual scenarios. What the level of the standard of proof will be and how higher courts will review such issues is a central question which will be influenced by the facts of the case, and national procedure and practice in the assessment of evidence, as well as by the standards of EU law. Good, clear economic evidence combined with other compatible factual evidence is something that courts will always find persuasive.

Case management of complex litigation and the role of “trust”

Complex litigation requires active case management by the courts, in order to adapt case schedules to its peculiar demands and enable the piecemeal, proportionate approach to disputed issues. Collaboration with the parties, their lawyers and their experts is a fundamental part of this. While perhaps traditionally, this has not been an effective practical principle in many jurisdictions, experience shows that, where courts involve parties in the process of case management, this foments trust and effective collaboration. This, in turn, contributes to desired procedural efficiency.

The need for a specialized competition tribunal

The challenges of managing mass competition private litigation, addressing the complexities of economic evidence of harm, dealing with voluminous documentation and assessing complex legal issues can be overwhelming for courts. This calls for the creation of specialized, centralized courts at a national level, which are bestowed with the necessary resources and capabilities to manage and adjudicate such cases. This has, in fact, been a constant recent recommendation of the CJEU in cases under the Brussels I bis Regulation.